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687454—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 675

VERNA MAE BIHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 25–32) and the dissent (R. 32–37) are reported *sub nom. United States* v. *Bennett*, at 152 F. 2d 342.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 15, 1945 (R. 37–38). The petition for a writ of certiorari was filed on December 17, 1945, and was granted on February 11, 1946 (R. 39). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the jury could reasonably have construed the trial court's charge as imposing on petitioner the burden of proving her innocence by showing that another specific person stole the gasoline ration coupons involved in the conspiracy alleged in the indictment.

STATUTES AND REGULATIONS INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States

will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * * *

(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

The pertinent provisions of General Ration Order No. 8, as amended (8 F. R. 9626, 9 F. R. 1325, 2746), issued by the Office of Price Administration, are as follows:

SECTION 2.6. *Acquisition, use, transfer or possession of ration document.*—No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration

document except in a way and for a purpose permitted by a ration order.

STATEMENT

Petitioner and George Wesley Bennett were charged in a one-count indictment, filed in the United States District Court for the Southern District of New York, with conspiring from July 1, 1943, to September 6, 1944, inclusive, to violate Section 2 (a) of the Act of June 28, 1940, as amended, and the regulations issued pursuant thereto (R. 3–5; *supra*, pp. 2–4). The indictment alleged that it was a part of the conspiracy that the defendants would unlawfully acquire, possess and transfer gasoline ration coupons; that petitioner would steal such coupons from the First National Bank of Poughkeepsie, New York, transfer them to Bennett, and share with Bennett the money obtained from the sale of the coupons. After a trial by jury, petitioner and Bennett were found guilty (R. 19). Petitioner was sentenced to imprisonment for one year and one day (R. 19–20). She alone appealed to the Circuit Court of Appeals for the Second Circuit, and the judgment of conviction was affirmed (R. 25–32, 37–38), one judge dissenting (R. 32–37).

Petitioner does not claim any error "in the admission, receipt or exclusion of evidence during the trial" (Pet. 7), nor does she challenge the

sufficiency of the evidence to support the verdict.[1] Her only contention is that the trial court committed reversible error in instructing the jury. Proper consideration of that contention requires a statement of portions of the evidence adduced at the trial.[2]

On September 5, 1944, the First National Bank of Poughkeepsie, which had undertaken to carry on ration banking functions on behalf of the Government, discovered that while its books showed that for the period August 17, 1944, to August 31, 1944, its customers had deposited gasoline ration coupons representing 156,795.5 gallons of gasoline, it had in its possession coupons representing only 119,772 gallons and that coupons representing 37,023.5 gallons were missing (R. 6, 8–9; S. M. 113–115, Gov. Ex. 6, S. M. 84). Petitioner had been in charge of the ration banking functions of the bank since the early part of September 1943, with the exception of the period January 31, 1944, to March 25, 1944, and the period June 5, 1944, to

[1] The majority opinion of the circuit court of appeals states that the evidence was sufficient to support the verdict (R. 30).

[2] The record on appeal in the court below contained a "Stipulation of Agreed Facts" (R. 5-9), the opening paragraph of which stated "that the facts mentioned hereafter are accurate, but neither party is precluded from referring to additional facts in the record on the argument of the appeal." Both the majority of the circuit court of appeals and the dissenting judge considered the evidence contained in the stenographic minutes of the trial (see R. 30, 32). The original stenographic copy of those minutes has been filed with the Clerk of this Court, and references thereto are designated "S. M."

June 19, 1944 (S. M. 79, 101, 123–124; R. 6). Her duties consisted of keeping custody and control of ration currency which the bank's customers deposited, verifying the deposits, and keeping records thereof (R. 7–8).

Merchant clients of the bank deposited, with the bank, ration coupons which they had received from their customers (R. 8; S. M. 80). These coupons were received by the bank tellers, and petitioner from time to time during the day would take them from the tellers, together with the deposit slips (R. 8, S. M. 79, 91, 124–125). She would then check the coupons against the deposit slips, and, in the event of error, which frequently occurred, she would mail a notice to the depositor (R. 8, S. M. 92–93, 124–125). She made daily entries of these deposits (S. M. 79, 94; R. 8). She placed the gasoline ration coupons in a steel letter file which was kept locked, and other ration coupons in a compartment in the bank's vault (S. M. 98, 125–126; R. 8).

Every two weeks petitioner would take the accumulated ration coupons and place them in a cardboard box. Up to June 14, 1944, the coupons were destroyed at the city incinerator. After June 14, 1944, they were forwarded to the Office of Price Administration, together with a form showing the contents of the box (S. M. 81, 127, 131). In preparing the form, petitioner would not make an actual count of the coupons but would

compile the figures from the daily deposit and recapitulation sheets, the latter of which were prepared from the daily sheets (S. M. 98, 128–129). On September 5, 1944, petitioner prepared a box of ration coupons for shipment to the Office of Price Administration, sealed it, and turned it over to the cashier of the bank, together with the necessary form, for the cashier's signature, the form representing on its face that the box contained, among other ration evidences, gasoline ration coupons for 156,795.5 gallons. The cashier did not sign the form but held it and the box for examination by the bank's auditors. Their examination disclosed that the box contained coupons for only 119,772 gallons, or a shortage of 37,023.5 gallons. There was, however, no discrepancy as to ration coupons for other commodities (R. 8–9; S. M. 82–84, 116).

From August 1943 until February 1944—during petitioner's employment at the bank—her codefendant Bennett lived with petitioner and her husband in their three-room apartment in Poughkeepsie (R. 6). In February 1944, Bennett married and moved to the home of his mother-in-law, Mrs. Howe (R. 6). On Easter Sunday 1944, Bennett left his wife, and upon examining his effects in a dresser in his room, his wife discovered a large quantity of ration coupons, including gasoline ration coupons (S. M. 51–52, 54–58; R. 7). Mrs. Howe was present when this occurred (S. M.

13–14). Bennett had previously told her that petitioner had given him ration coupons (S. M. 17; R. 7). About a week before they were married, Bennett's wife accidentally discovered a number of ration coupons in a compartment in Bennett's automobile (S. M. 53), and Bennett told her at that time that petitioner had given the coupons to him (S. M. 58; cf. R. 7).

In May 1944, an altercation occurred in front of Bennett's new home. The participants were Bennett, his wife, his mother-in-law, his sister-in-law, and petitioner. The mother-in-law testified that after asking petitioner to leave, she told petitioner that "if she didn't leave us alone I would be forced to notify the F. B. I., that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank." According to the mother-in-law, petitioner replied: "Go ahead. Your son-in-law is in it just as deep as I am, and if I go to prison he will go too" (S. M. 5–6; R. 7).

Shortly after the quarrel, petitioner sent a letter to Bennett and a carbon copy of the letter to his mother-in-law. The letter referred to the quarrel, and it contained the statement: "I didn't miss the crack about the F. B. I. Looks to me like you are trying to break into prison with your bare hands. Don't worry I can take it. I haven't much more than that now. But I think con-

fining you will hurt you worse than it will me" (R. 7).

A government witness testified that in October and November 1943, he had purchased gasoline ration coupons from Bennett, who indicated to him that he had secured them from "some woman, but he didn't say who she was" (S. M. 46–47). Another government witness testified that in the summer of 1944 he had purchased sugar ration coupons from Bennett (S. M. 41).[3]

Petitioner denied that she had ever taken any ration coupons from the bank, had ever given any coupons to Bennett, or had any agreement to do so (S. M. 132, 140). Through cross-examination of the cashier of the bank and through her own testimony, petitioner showed that the keys to the file in which the gasoline ration coupons were stored were kept in a drawer in her desk, which had no lock; that the cashier had a key to this file; that the note teller, assistant note teller, and a stenographer "had access to and the occasion to

[3] There was other evidence, in the form of statements made by Bennett before the grand jury, which was admitted only as against Bennett (S. M. 117–119), to the effect that during the period he lived with petitioner and her husband, petitioner brought home and gave to Bennett, on approximately ten occasions, an average of 300 to 500 gasoline ration coupons which Bennett sold, dividing the proceeds with petitioner. These statements were admitted as an exhibit (Gov. Ex. 9, S. M. 119). They are summarized in the stipulation of agreed facts (R. 6).

go to said steel file * * * and they would not ask for the key of [petitioner], but would go to her desk and help themselves * * *," and "if the ration bookkeeper [petitioner] was not present to furnish information or ration tokens, another employee would take care of the client" (R. 8; S. M. 99–100, 109, 126–127, 130). In addition, petitioner testified that Ann Shannon, who was in charge of the ration banking during the period January 31, 1944, to March 25, 1944 (S. M. 105, 124), was Bennett's "girl friend" (S. M. 143).

During the course of his charge to the jury, the trial judge said (R. 15):

> Her [petitioner's] claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.
>
> Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, or

> the question of intent. Did she steal them? Who did if she didn't? You are to decide that. Did she turn them over to Bennett to dispose of them? You have heard the testimony of the witnesses for the Government and of the witnesses for the defendant.

Petitioner's counsel excepted to the charge "that it is the jury's duty to find out who did steal the stamps. 'Did she? Who did if she did not? You are to decide that.' I except to that because it is not part of the jury's duty." To this, the judge responded: "Yes, I say that was not the crime but the question is whether these defendants entered into a conspiracy to steal, possess and transfer these stamps." (R. 17.) Counsel, after stating that "That is not the point of my exception" (R. 17), went on to take up other complaints he had in respect of the charge.

The majority of the court below conceded that if the quoted portion of the charge could be fairly construed as an instruction to the jury that it must decide not only that petitioner did not steal the coupons, but who did steal them, before it could acquit her, reversible error was committed because the burden was placed upon her to prove her innocence by showing the identity of the thief or thieves (R. 30). However, the majority concluded that reversible error had not been committed because the fair import of the language was "not that the jury had to determine who in

fact stole the coupons if it failed to find that [petitioner] did but to decide whether she or someone else stole them and to consider that in determining whether she intentionally participated in a conspiracy as charged" (R. 31–32). The dissenting judge thought that there was no basis for assuming that the jurors did not accept at its face value the judge's statement that they were to decide who stole the coupons if petitioner did not (R. 35).

SUMMARY OF ARGUMENT

The sole question presented by this case is whether the jury could reasonably have understood the judge's charge as requiring petitioner to show, in order to be acquitted, that one of the other persons who had access to the gasoline ration coupons involved in the conspiracy charged stole them. If the jury could reasonably have so interpreted the charge, the Government concedes that reversible error was committed, since the burden of proving her innocence was placed upon petitioner. The Government takes the position that the charge was not fairly susceptible of that construction, and, therefore, that the recent decision of this court in *Bollenbach* v. *United States,* decided January 28, 1946, No. 41, this Term, is not applicable.

The error assigned is predicated on a few words appearing in a charge covering approximately ten

pages of the printed record. Whether those words are read in isolation or in connection with the charge as a whole, as they should be, there is no reasonable basis for claiming that the jury could have been misled into believing that the burden of proof was on petitioner in the respect asserted by her. On seven occasions during the charge, the judge told the jury that the Government was required to establish petitioner's guilt beyond a reasonable doubt; four of these occasions occurred subsequent to his utterance of the allegedly erroneous instruction. On such a record, it is unreasonable to conclude that the jury may have thought that petitioner could establish her innocence of the conspiracy charge only by proving who actually stole the ration coupons.

When the language in question is placed in its proper setting, it becomes additionally evident that the trial judge was not instructing the jury that the burden of proving her innocence was on petitioner, but was only commenting, as he had a right to do, on the evidence in the case as it applied to the issues involved. Whether petitioner had stolen the gasoline ration coupons involved in the conspiracy charged or whether one of the other persons who had access to them might have stolen them were relevant questions, the answers to which would materially aid in deciding whether petitioner was guilty of conspiring as charged. In the judge's rhetorical questions to the jury, "Did

she steal them? Who did if she didn't," and in the words, "You are to decide that," the judge was only telling the jury, as he was required to do, that they were free to determine whether someone else might have been the culprit. It would appear to be a gross distortion to say that the judge was thereby instructing the jury that petitioner was required to prove that one of the other bank employees who had access to the stamps was the thief, or that the jury could have so understood the judge.

ARGUMENT

The only question in this case is whether the portion of the trial judge's charge to the jury quoted *supra*, pp. 10–11, particularly the words, "Did she [petitioner] steal them [the gasoline ration coupons]? Who did if she didn't? You are to decide that," could reasonably have been understood by the jury as requiring petitioner to show, in order to be acquitted, that one of the other persons who had access to the coupons (see *supra*, pp. 9–10), stole the coupons. If the jury could reasonably have so interpreted the charge, the Government concedes that reversible error was committed, since the burden of proving her innocence would thus have been placed upon petitioner. Cf. *Coffin* v. *United States*, 156 U. S. 432, 461; *Boatright* v. *United States*, 105 F. 2d 737, 740 (C. C. A. 8); *Ward* v. *United States*, 96 F. 2d 189, 192 (C. C. A. 5). The Govern-

ment's position is that the charge was not fairly susceptible of being understood by the jury as requiring petitioner to prove, in order that they might acquit her, that one of those persons who had access to the coupons stole them.

THE JURY COULD NOT REASONABLY HAVE UNDERSTOOD THE JUDGE'S CHARGE AS REQUIRING PETITIONER TO PROVE, IN ORDER THAT SHE MIGHT BE ACQUITTED, THAT ONE OF THE OTHER PERSONS WHO HAD ACCESS TO THE GASOLINE RATION COUPONS STOLE THE COUPONS

Petitioner contends (Br. 9–14), as did the dissenting judge below (R. 34–36), that the trial judge shifted the burden of proof, requiring her to exculpate herself, when, in commenting on the theft of the ration coupons, the judge asked the rhetorical questions quoted above as to who stole the coupons. She argues that these questions are fairly construable as instructing the jury to decide who the thief was, if she was not, thus imposing on her, as indicated in the dissenting opinion below, "the burden of * * * proving the identity of some other person as the thief." (R. 35.) The majority of the court below took the view, and we submit correctly so, that "the language used is not, * * * ambiguous in its setting or reasonably to be understood to mean that the [petitioner] had the burden to prove anything as a condition upon her acquittal. * * * The fair import of such language is not that the jury had to determine who in fact stole the coupons

if it failed to find that she did but to decide whether she or someone else stole them and to consider that in determining whether she intentionally participated in a conspiracy as charged." (R. 31–32.)[4]

In *Bollenbach* v. *United States,* decided by this Court on January 28, 1946, No. 41, this Term, slip sheet, p. 5, the Court said that "A conviction ought not to rest on an equivocal direction to the jury on a basic issue," and, referring to the unanimous opinion of the circuit court of appeals in that case that the charge to the jury was wrong, the Court said: "And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal." We do not have that situation here. Not even the dissenting judge in the court below thought that the charge, properly understood, was erroneous.[5] The only basis for his dissent was that the jury might have been misled. As to this, the other two judges reached an oppo-

[4] Contrary to the view of the dissenting judge (R. 36–37) and the argument of petitioner here (Br. 18–21), we do not think that the case involves any issue as to the permissible limits of a federal appellate court's discretion to disregard error which it considers to have been harmless to the defendant. As indicated above, the majority decision is bottomed squarely upon the view that the portion of the instruction complained of did not in its context constitute error.

[5] Judge Frank said: "The charge would perhaps not have been so interpreted [to place the burden of proving her innocence on the petitioner] by one with a well trained legal mind." (R. 35.)

site conclusion, and there is nothing in the *Bollenbach* case to suggest that a division of opinion among the appellate judges as to the possibility of the jury's having misunderstood the charge is conclusive evidence that the charge must have confused and misled the jury. If this were the rule, convictions would have to be reversed on the basis of the view of a minority of the reviewing court. The question in this case cannot be answered by resort to such a mechanical test—a device through which the appellate court, essentially, abdicates its duty of making a reasoned judgment.

The task of the appellate court in a case of this sort is to determine what the jury's understanding was. Of course, no one can say, to a mathematical certainty, that the jury was not misled. Doubts as to a jury's understanding of a charge are inevitable in any case.* Convictions should be reversed, however, only if the appellate court can find that the jury could reasonably have misunderstood the judge's charge.

The portion of the charge under attack did not even literally place upon petitioner the burden of proving the guilt of another as a necessary condition upon her acquittal. Moreover, defendants in criminal cases often have sought to upset their convictions by plucking from the charge to the jury some portion which, considered by itself,

* "In most English words and phrases there lurk uncertainties." *Robinson* v. *United States*, 324 U. S. 282, 286.

suggests that the jury was furnished an erroneous standard for judging guilt. But in cases of that kind, this Court and the circuit courts of appeals have said that the challenged portion of the charge is not to be read in isolation, but with the charge as a whole, with what preceded and with what followed, and, if in that aspect, there is no reasonable basis for claiming that the jury was charged incorrectly, the attack must fail. See *Boyd* v. *United States*, 271 U. S. 104, 107; *Clarke* v. *United States*, 132 F. 2d 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789; *Hargreaves* v. *United States*, 75 F. 2d 68, 73 (C. C. A. 9), certiorari denied, 295 U. S. 759; *Caldwell* v. *United States*, 36 F. 2d 742, 744 (C. C. A. 10), certiorari denied, 281 U. S. 725; *Wallenstein* v. *United States*, 25 F. 2d 708, 712 (C. C. A. 3), certiorari denied, 278 U. S. 608; cf. *Evanston* v. *Gunn*, 99 U. S. 660, 668.[7] We submit that, when the charge is read as a whole, it becomes abundantly clear that the jury could not fairly have construed the language under consideration as requiring petitioner to prove as a condition to her exculpation that one of the other persons who had access to the gasoline coupons stole them.

The charge comprises about ten pages of the printed record (R. 9–19). Throughout the

[7] It may be noted that in the *Wallenstein* case, one of the circuit judges dissented because he thought that the jury must have been misled by the instruction to consider an issue not properly in the case.

charge, the trial judge emphasized that the jury must find from the evidence that the Government had established beyond a reasonable doubt that a conspiracy as alleged in the indictment existed and that an overt act in pursuance of the conspiracy had been committed. We here set out the trial judge's instructions in this respect:

> 1. [R. 10] The defendants in this case as in all criminal cases are presumed to be innocent until proven guilty beyond a reasonable doubt, and that presumption of innocence stays with the defendants from the beginning to the end of the trial and until you are satisfied beyond a reasonable doubt of guilt.
>
> 2. [R. 13] Having satisfied yourselves beyond a reasonable doubt that the Government has shown the agreement, it makes no difference what overt act was done, as long as you find beyond a reasonable doubt that an overt act was done to carry out the agreement.
>
> 3. [R. 13] Has the Government proved and satisfied you beyond a reasonable doubt that these two defendants are guilty of a corrupt agreement and the performance of an overt act to carry out the agreement? If that has been proven, then the defendants are guilty. Otherwise they are not.
>
> 4. [R. 16] A defendant is not required to establish his innocence but the Government must establish guilt beyond a reasonable doubt.

5. [R. 16] If the Government has established guilt beyond a reasonable doubt, you will find these defendants guilty.

6. [R. 18] Of course the Government must establish the question of guilt beyond a reasonable doubt.

7. [R. 18] Mr. SAYPOL [counsel for petitioner's codefendant]. Once they [the jury] have a reasonable doubt they must stop.

The COURT. Of course.

The jury was thus instructed seven times that petitioner could not be found guilty unless they found that her guilt was established beyond a reasonable doubt. They were so told four times after the trial judge uttered the few words which petitioner asserts cast upon her the burden of establishing her innocence. On this record, we suggest that it is unreasonable to believe that the jury could have so understood those few words.

Furthermore, when the language under consideration is placed in its proper setting, it seems evident to us, and we believe that it was equally evident to the jury, that the judge was not telling them that petitioner was under a duty to establish to their satisfaction the identity of the thief or thieves, but was merely explaining and commenting, as he was entitled to do, on the evidence in the case. It is well settled that a federal judge may "assist the jury in arriving at a just con-

clusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." *Quercia* v. *United States,* 289 U. S. 466, 469; see also, *United States* v. *Murdock,* 290 U. S. 389, 394.

The judge had a short time earlier adverted to the theory of the prosecution that pursuant to the conspiracy charged, petitioner was to steal the ration coupons from the bank and give them to her codefendant, who would sell them and divide the proceeds with petitioner (R. 14). He then proceeded to explain and to comment on the evidence in the case. First, he called the jury's attention to petitioner's denial in her testimony that she was implicated in the conspiracy, stating, "I am referring to the testimony, not for the purpose of emphasis, but to aid you in arriving at a verdict." Then he described petitioner's duties in respect of the ration coupons, and how the shortage had been discovered (R. 14). He next referred to petitioner's claim that other employees of the bank had access to the coupons, at the same time, however, referring to the fact that petitioner was in charge of keeping the coupons and that it was her responsibility to prepare an accurate account of them when they

were sent to the Office of Price Administration (R. 15).* It was at this point in the charge that the judge said (R. 15):

> Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? You are to decide that. Did she turn them over to Bennett to dispose of them? You have heard the testimony of the witnesses for the Government and of the witnesses for the defendant.

Immediately following these statements, the judge said (R. 15):

> Mrs. Howe, the mother, you heard her testimony; how did that impress you? Did she impress you as somebody who would take the witness stand and deliberately commit perjury? And her daughters.

---

*Petitioner asserts (Br. 13–14) that in this latter portion of the instructions the judge disparaged her claim that someone else might have committed the theft. However, the judge in these comments had called the jury's attention to petitioner's strongest defense, and it was not unfair comment, we submit, to advert in this connection to petitioner's duties in respect of the ration coupons. In this very connection, moreover, the trial judge told the jury that "I understood [petitioner] to so testify. It is the jury's recollection of the facts that will control. If your recollection doesn't agree with mine you are to disregard my recollection." (R. 17.)

> You have also heard the testimony of Bennett where he testified before the Grand Jury and spoke of his participation in the disposition of the stamps.
>
> You have heard the testimony of the witnesses about having received stamps from him. Well, you are to decide it. Please do not lay aside your common sense when you decide it. Apply it.

The judge then turned from the evidence in the case to general rules by which the jury was to be guided in arriving at a verdict.

On the evidence, a plainly relevant question for the jury was whether petitioner had stolen the stamps or whether one of the other persons who had access to them might have stolen them. The answer to this question might well go far in the direction of a conclusion on the basic issue in the case—whether petitioner had conspired to unlawfully possess and transfer gasoline ration coupons. Before stating the rhetorical questions, "Did she steal them? Who did if she didn't?", the judge did not instruct the jury that it must answer these questions; he simply said that "you have a right to consider that" (R. 15). He was, we think, only calling the attention of the jury to the materiality of these questions, and with the words, "You are to decide that," he was telling the jury, as he was required to do, that it was *for them* to determine whether someone else might have stolen the coupons. To us, it seems a gross

distortion to say that the judge was instructing the jury that the burden was on petitioner to establish her innocence by proving that one of the other bank employees who had access to the stamps was the culprit, or that the jury could have so understood the judge.

A criminal appeal should not be turned into a quest for error. See *Johnson* v. *United States*, 318 U. S. 189, 202. The record should not be hunted over less to discover real error or injustice than to pick a flaw on which to hang an objection. *Commonwealth* v. *Karamarkovic*, 218 Pa. 405, 406.

CONCLUSION

Petitioner was found guilty by a jury who were instructed correctly. We respectfully submit, therefore, that the judgment below should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 675.—October Term, 1945.

Verna Mae Bihn, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 10, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner and one Bennett were convicted of a conspiracy[1] to violate the statute and regulations governing the rationing of gasoline.[2] It was charged that between July 1, 1943 and September 6, 1944 petitioner would steal gasoline ration coupons from the First National Bank of Poughkeepsie, New York, where she was employed, transfer them to Bennett, and share with Bennett the proceeds of the sales. The case was tried to a jury. Petitioner alone appealed to the Circuit Court of Appeals, which sustained the judgment of conviction, one judge dissenting. 152 F. 2d 342. The sole question presented below and here is whether a portion of the charge constituted reversible error. We granted the petition for a writ of certiorari because the charge given raised an important question in the administration of the federal criminal laws.

The crucial issue, so far as petitioner's case was concerned, was whether she stole the ration coupons from the bank.

Bennett did not take the stand. Statements made by him out of court were introduced. They implicated petitioner in the scheme. But they were admissible against Bennett alone, not against petitioner. And the trial judge so ruled. Two of Bennett's relatives—his mother-in-law and sister-in-law—testified concerning conversations they had had with petitioner. Their versions of the conversations implicated petitioner in the scheme. Petitioner's version was different. The conflict in testimony presented a question of credibility for the jury. Bearing on that was the

[1] Criminal Code § 37, 18 U. S. C. § 88.

[2] Sec. 2 (a) of the Act of June 28, 1940, as amended, 54 Stat. 676, 55 Stat. 236, 56 Stat. 177, 50 U. S. C. App. Supp. IV, § 633; § 2.6 of General Ration Order No. 8, as amended, 8 Fed. Reg. 9626, 9 Fed. Reg. 1327, 2746.

possible bias of those witnesses, traceable in part to their hostility to petitioner on account of the fact that she apparently had been on intimate terms with Bennett prior to his marriage.

There was no direct evidence that petitioner had stolen the coupons. There was, however, other evidence from which such an inference could be drawn. It assumed a place of considerable importance at the trial. And the alleged error in the charge relates to it.

Petitioner handled ration coupons which merchants deposited with the bank. The ration coupons were received by tellers for deposit. After the coupons had been received for deposit by the tellers, petitioner checked the deposits against the deposit slips and kept the rationing records. After counting the coupons and making the entries, she placed the coupons in a steel file which was locked. The keys to the file were kept in her desk which was also locked. At regular intervals petitioner would take the accumulated ration coupons and box them for transmission to the Office of Price Administration. She would also prepare a form showing the contents of the box. In preparing this form, she would not recount the coupons but would compile the figures from the daily records which had been prepared as the coupons were deposited. On September 5, 1944, petitioner prepared a box for transmission to the Office of Price Administration, sealed it, and turned it over to the cashier of the bank. The accompanying form represented on its face that the box contained gasoline ration coupons for some 156,000 gallons. Its examination showed a shortage of some 37,000 gallons. Petitioner had a good record at the bank. The accounts which she kept were kept well and accurately. She was not the only one who had access to the coupons in the steel file. At least four other employees of the bank had equal access to that file. One of these was a lady with whom, according to petitioner's testimony, Bennett had a rather intimate acquaintance.

The case against petitioner was therefore a close one. Plainly there was sufficient evidence for submission of the case to the jury. But since one of four other persons might have purloined the coupons, reasonable doubt as to petitioner's guilt might readily be inferred.

It was against this background that the trial judge charged the jury:

"Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. *Did she steal them. Who did if she didn't? You are to decide that.*" (Italics added)

Counsel excepted to the charge on the ground that it was not "the jury's duty to find out who did steal the stamps." No modification of the charge was made.

We assume that the charge might not be misleading or confusing to lawyers. But the probabilities of confusion to a jury are so likely (cf. *Shepard* v. *United States*, 290 U. S. 96, 104), that we conclude that the charge was prejudicially erroneous.

Instructions to acquit, if there was reasonable doubt as to petitioner's guilt, were given in other parts of the charge. Those were general instructions. They would be adequate, standing alone. But on the crucial issue of the trial—whether petitioner or one of four other persons stole the coupons from the bank—no such qualification was made; and the question was so put as to suggest a different standard of guilt. As stated by Judge Frank in his dissenting opinion below: "Literally interpreted, the judge's charge told them that this was not sufficient to justify acquittal, for it was their 'duty' (a) to decide that appellant committed the theft unless (b) they decided that some other specific person did. So interpreted, this charge erred by putting on appellant the burden of proving her innocence by proving the identity of some other person as the thief." 152 F. 2d, p. 348. Or to put the matter another way, the instruction may be read as telling the jurors that if petitioner by her testimony had not convinced them that someone else had stolen the ration coupons, she must have done so. So read, the instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials

[a] "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The Federal Rules of Criminal Procedure, effective March 21, 1946, provide that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Rule 52 (a). This is merely a restatement of existing law and effects no change in the "harmless error" rule.

of those accused of crime. See *Quercia* v. *United States*, 289 U. S. 466, 469.

The "harmless error" statute[3] (Judicial Code § 269, 28 U. S. C. § 391) means that a criminal appeal should not be turned into a quest for error. It does not mean that portions of the charge are to be read in isolation to the full charge and magnified out of all proportion to their likely importance at the trial. *Bo* v. *United States*, 271 U. S. 104, 107. Yet as stated in *McC* v. *United States*, 298 U. S. 342, 347-348, "an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." It seems plain that the inflection or tone of voice used in giving the challenged instruction could make it highly damaging. And in any event the probable lines of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we cannot say that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Rottenbach* v. *United States*, 327 U. S. —.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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Mr. Justice Black, dissenting.

The jury found this defendant guilty beyond a reasonable doubt after the trial judge had charged that "A defendant is not required to establish his innocence but the [illegible] must establish guilt beyond a reasonable doubt. [illegible] is also clear that if the circumstances surrounding the case are as consistent with innocence as with guilt, he is not guilty." Six other times the judge explicitly charged the jury to the same effect. The defendant's innocence is presumed; she need not prove it; the burden is on the Government to prove her guilt beyond a reasonable doubt. Yet the Court now reverses on the ground that the jury might conceivably have taken three sentences in the trial judge's charge to mean that the defendant must prove innocence, which conceivably might have led the jury to believe that the court might have instructed to withdraw his seven explicit instructions to the contrary. The three sentences were: "Did she steal them? Who did if she did not? You are to decide that." Instructions such as these as to who stole the coupons were necessary because of the petitioner's defense that somebody else had taken them. The trial judge was obviously telling the jury not to ignore the petitioner's defense. No reference was made to burden of proof and no ordinary juror, unskilled in legal dialectics, would have suspected the latent ambiguity which the Court has discovered. Of course, hypercritical scrutiny of each word and sentence in every charge when considered alone would always reveal dual meanings. The sentences here in question, like the sentences in every charge, should be given a common sense interpretation in their relationship to all instructions and the issues raised. When so considered, it is impossible for me to believe that the jury was confused as to burden of proof. Seven correct explicit instructions should not be considered neutralized by legalistic inferences established by purely formal analysis.

Mr. Justice Reed and Mr. Justice Burton join in this dissent.